



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1994

Mr. Michael J. Cosentino
Acting City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR94-703

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 23901.

The City of Austin (the "city") has received a request for copies of the proposals submitted in response to Solicitation No. HM93300034. We understand that the requestor specifically seeks the proposals Spectacor Management Group ("SMG") and Dallas Market Center ("DMC") submitted. You have provided the following background information:

Request for Proposal No. HM93300034 (the "RFP") was issued by the City on August 10, 1993, for private management of the Austin Convention Center Facilities. Three proposals were received in response to the RFP on August 13, 1993, with "best and final responses" provided in September of 1993. After evaluation of the proposals along with conclusion of interviews with candidates for the job of manager of the facilities, the City chose to hire an individual and retain management responsibilities within the City. No contract will be awarded as a result of this solicitation process.

You admit that the city did not request a decision from the attorney general regarding the availability of the requested information within ten days of receiving the request. See Gov't Code § 552.301(a) (requiring governmental body that receives written request for information it believes is excepted from required public disclosure to request attorney general's decision within ten calendar days of receiving request). Failure timely to request the attorney general's decision results in a presumption that the requested

information is public, *see id.* § 552.302, and a governmental body may overcome this presumption only by demonstrating that the information is confidential or that an exception designed to protect the interest of a third party is applicable. *See* Open Records Decision No. 552 (1990) at 1. You contend that third party interests are at stake in this instance. We will, therefore, proceed to consider your request.

Pursuant to section 552.305 of the Government Code, we have notified SMG and DMC of the request and have solicited arguments in support of your suggestion that the information may be confidential. We received no response from SMG. We therefore conclude that SMG's proposal is not confidential and that the city must release it in its entirety. DMC, on the other hand, responded by claiming that sections 552.104 and 552.110 except all or part of the requested information from required public disclosure.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the governmental body's interests in relation to competition for a contract or benefit. Open Records Decision No. 592 (1991) at 3. It does not protect the interests of private parties. *Id.* at 9. Thus, a private party may not raise section 552.104 on behalf of a governmental body.¹ Moreover, section 552.104 is generally inapplicable when the bidding on a contract has been completed. Open Records Decision No. 541 (1990) at 5. Consequently, we conclude that section 552.104 does not apply to the requested information.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. DMC claims that all or part of the information in its proposal to the city constitutes trade secrets. Accordingly, we need address only the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other

¹Section 552.104 of the Government Code is a discretionary exception that a governmental body may choose to waive. Open Records Decision No. 592 at 8. You did not raise section 552.104 on behalf of the city. Moreover, even if you had, your failure to raise the exception within ten days of receiving the request for information would constitute a waiver.

device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). The Restatement lists six factors we must consider when determining whether particular information is a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.; see also Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2.

If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim that the information is trade secret if the person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. On the other hand, when an agency or company fails to provide relevant information regarding factors necessary to make a claim under section 552.110, a governmental body has no basis for withholding the information under section 552.110. See Open Records Decision No. 402 (1983) at 2.

We do not agree with DMC's assertion that all of the information in its proposal to the city constitutes trade secret. We will consider, therefore, whether DMC has demonstrated that certain portions of its proposal are trade secret and excepted from required public disclosure by section 552.110. Specifically, DMC contends that five types of documents constitute trade secrets:

- (1) financial statements;
- (2) customer lists;
- (3) profit and loss statements for specific convention centers;

- (4) dollar value of specific events held in a specific center; and
- (5) DMC's contracts with exclusive providers.

DMC states that its financial statements are confidential and that releasing the financial statements would provide DMC's competitors with an unfair advantage. However, we have reviewed the financial statements, and they appear to present a financial snapshot of the company at certain points in time. The records do not indicate facially, and DMC does not sufficiently explain, how the financial statements document a process or device for continuous use in the operation of the business. See RESTATEMENT OF TORTS § 757 cmt. b (1939). Accordingly, we conclude that DMC's financial statements are not trade secrets. Furthermore, we are unaware of any other statute that renders financial statements such as these confidential.²

DMC has enumerated three customer lists that it claims were included in its proposal to the city. We have located only one such list, entitled "Signed Booking Agreements During February 1993." We are able to address specifically only the list we have reviewed.

DMC has presented arguments that its customer lists are trade secret information. Despite the conclusory nature of the arguments, we conclude that DMC has presented a prima facie case that its customer lists are trade secret and that DMC's argument is un rebutted as a matter of law. We note, however, that some of DMC's customer lists may be considered "collected, assembled, or maintained" by or for a governmental body in another state. For example, DMC claims that the customer list we have reviewed is confidential, but we understand that DMC compiled this information as manager of the Valley Forge Convention Center. We are uncertain as to whether the Valley Forge facility is publicly owned, similar to the Austin Convention Center. If it is, the information may be public by law.

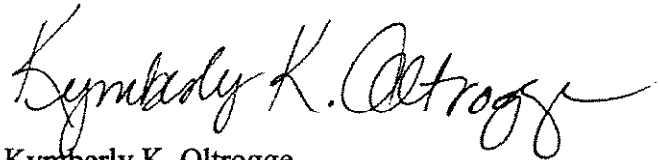
We have been unable to locate among the records you submitted for our review the profit and loss statements for specific convention centers, the dollar value of specific events held in a specific center, and DMC's contracts with exclusive providers. On the basis of DMC's arguments, however, we believe that DMC has failed sufficiently to explain how any of this information documents a process or device for continuous use in the operation of the business. See RESTATEMENT OF TORTS § 757 cmt. b (1939).

²In general, a corporation has no right of privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), cited in *Rosen v. Matthews Const. Co.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 795 S.W.2d 692 (Tex. 1990); see Open Records Decision No. 192 (1978) at 4 (stating that right of privacy protects feelings and sensibilities of human beings, not property, business, or other pecuniary interests).

Furthermore, to the extent that any of this information relates to a publicly owned facility, we believe it unlikely that the information is confidential. We accordingly conclude that the profit and loss statements, the dollar values, and contracts are not trade secret information for purposes of section 552.110. The city must, therefore, release the information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kimberly K. Oltrogge
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Open Government Section

KKO/SLG/rho

Ref.: ID# 23901

Enclosures: Submitted documents

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